87-1586

No. .....

Supreme Court, U.S.
FILED
MAR 24 1988
JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1987

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BRUNO G. CHALKO,

Appellant,

v.

SHARON E. CHALKO,

Respondent.

—o—

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

—o—

JURISDICTIONAL STATEMENT

—o—

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QUESTIONS PRESENTED

1. Did California Civil Code section 5124 unconstitutionally impair the obligation of contract in violation of both the federal and California constitutions when it impaired the final judgment of appellant Bruno Chalko in this case?

2. Did California Civil Code section 5124 unconstitutionally deprive appellant Bruno Chalko of vested property rights without due process of law in violation of the constitutions of the United States and California?

3. Did California Civil Code section 5124 unconstitutionally deny equal protection of the laws to the class of military personnel whose rights to their retirement benefits had been decided in dissolution proceedings which became final between June 26, 1981, and February 1, 1983, which class includes appellant Bruno Chalko?

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In The

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October Term, 1987

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BRUNO G. CHALKO,

Appellant,

v.

SHARON E. CHALKO,

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ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

—o—

JURISDICTIONAL STATEMENT

—o—

Bruno G. Chalko, the appellant, appeals from the final judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, filed October 20, 1987, upholding the constitutionality of former California Civil Code section 5124, as applied in this case, in the face of appellant Chalko's claims that (1) the Cali-

fornia statute impaired the obligation of contract in violation of article I, section 10, clause 1 of the United States Constitution, that (2) it deprived appellant Chalko of property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and that (3) it denied him equal protection of the laws as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Appellant Chalko's petition for review to the California Supreme Court was denied on January 6, 1988.

—o—

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, filed October 20, 1987, is unpublished and is reproduced in Appendix A. The California Supreme Court's January 6, 1988 order denying review after judgment by the Court of Appeal is reproduced in Appendix B.

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JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was filed on October 20, 1987. App. 1-16. On January 6, 1988, the California Supreme Court denied appellant Chalko's timely petition for review to that court. App. 17.

A notice of appeal to this Court was timely filed in the California Court of Appeal, Fourth Appellate District, Division Two on February 22, 1988. App. 18.

This appeal is being docketed in this Court within 90 days from the denial of the petition for review to the California Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

Contract Clause, art. I, § 10, cl. 1, U.S. Constitution:

> No State shall . . . pass any Law impairing the Obligation of Contracts, . . .

Fourteenth Amendment, § 1, U.S. Constitution:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Former California Civil Code section 5124:

> (a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as

it existed before June 26, 1981, and as it has existed since February 1, 1983.

(b) Modification of community property settlements, judgments, or decrees under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement, judgment, or decree became final, divisible community property.

(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date.

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HOW THE FEDERAL QUESTIONS WERE RAISED

The three federal constitutional questions were first raised in the California Court of Appeal as questions of law presented by the undisputed facts of this case which could be considered by the Court of Appeal for the first time at that level. The Court of Appeal decided all three federal questions on the merits. *See* App. 7-12. Where the highest state court holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, it is well settled by decisions of this Court that the federal questions have been properly raised in the state courts. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Whitney v. California*, 274 U.S. 357, 360-61 (1927).

STATEMENT OF THE CASE

A. The McCarty Opinion

On June 26, 1981, this Court filed its opinion in *McCarty v. McCarty*, 453 U.S. 210 (1981) holding that federal law preempted a state court from dividing military retired pay pursuant to state community property law and specifically holding that California community property law was preempted by federal law on this issue. The *McCarty* decision held that military retired pay was the personal entitlement of the retiree, *i.e.*, his separate property. 453 U.S. at 227.

B. McCarty Applicable to 1982 Chalko Judgment

McCarty was governing precedent when the marriage of respondent Sharon Chalko and appellant Bruno Chalko was dissolved by an interlocutory judgment of dissolution of marriage which, was filed and entered June 7, 1982, in the Superior Court of the State of California in and for the County of San Bernardino. This judgment was entered pursuant to the terms of a marital settlement agreement executed by the parties. The Marital Settlement Agreement was approved by the superior court and was incorporated by reference in the interlocutory judgment.

C. The 1982 Judgment Became Final on August 6, 1982, When Sharon Chalko Did Not Appeal

Respondent Sharon Chalko did not appeal the June 7, 1982 interlocutory judgment, and the judgment became final sixty days thereafter under California law. Rule 2(a) of the California Rules of Court provides that an appeal must be taken within 60 days of notice of entry of

judgment or within 180 days after entry of the judgment if no notice of entry is given by the clerk or a party to action. No notice of appeal was ever filed by Sharon Chalko within these time limits.

D. How the Judgment (and the Underlying Marital Settlement Agreement) Treated Appellant Bruno Chalko's Marine Corps Retired Pay and His Ex-Wife's Bendix Retirement Plan

Under the interlocutory judgment dissolving the Chalko marriage (and pursuant to the underlying Marital Settlement Agreement), each party was awarded pension rights derived from his or her employment. The "Bendix Pension rights earned by Wife" were transferred to respondent Sharon E. Chalko. "The military pension rights earned by Husband" were transferred to appellant Bruno G. Chalko. As of the 1982 judgment of dissolution, neither Sharon nor Bruno had retired. In fact, appellant Bruno Chalko did not retire from the United States Marine Corps until the spring of 1987.

E. Further Provisions of the 1982 Marital Settlement Agreement Incorporated into the 1982 Judgment Between the Parties

One of the express purposes of the Marital Settlement Agreement was to effect a complete and final settlement of "(a) All of the respective property rights of the parties." The parties exchanged mutual releases and waived claims to future earnings and acquisitions of each other.

F. The 1983 Federal Uniformed Services Former Spouses Protection Act

After the Chalko interlocutory judgment became final, the Federal Uniformed Services Former Spouses Protection Act (FUSFSPA), 10 U.S.C. § 1408, became effective February 1, 1983. This Act of Congress was intended to overrule this Court's *McCarty* decision by permitting state courts to treat "disposable retired or retainer pay payable to a member for pay periods after June 25, 1981, either as property of the member or his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). This federal legislation did not, however, authorize the reopening of any final judgments.

G. California's Interpretation of FUSFSPA as Being Non-Retroactive

After the enactment of FUSFSPA, the California courts held that FUSFSPA was applicable only to those cases not yet final as of its effective date—February 1, 1983. *Mueller v. Walker,* 167 Cal.App.3d 600, 605, 213 Cal.Rptr. 442 (1985). Here the judgment dissolving the parties' marriage became final before the effective date of FUSFSPA.

Moreover, it has been a general principle of Califorina law that after the trial court has divided the property of the marriage (as it did here on June 7, 1982), and the judgment has become final for purposes of appeal (as it did here sixty days after June 7, 1982), the trial court loses jurisdiction to modify or alter the division made. *Bodle v. Bodle,* 76 Cal.App.3d 758, 767, 143 Cal.Rptr. 115 (1978). Absent fraud or mistake, the only exception to this general rule arises where a court expressly reserves

jurisdiction to modify a property award. *In re Marriage of Brown*, 15 Cal.3d 838, 850-851, 126 Cal.Rptr. 633, 544 P.2d 561 (1976). In this case, neither the parties in their Marital Settlement Agreement nor the trial court had reserved jurisdiction to modify the property award made on June 7, 1982.

As was noted in *Mueller v. Walker*, *supra*, 167 Cal. App.3d at 606, the *McCarty* decision continued to state the controlling law as to those judgments and decrees which had become final during the 18-month period between the *McCarty* decision and the effective date of FUSFSPA. The interlocutory judgment dissolving the Chalkos' marriage and dividing their property fell within this so-called "window period" between *McCarty* and FUSFSPA.

H. The Enactment of Former California Civil Code Section 5124 and Its Effect

After the passage of FUSFSPA and more than a year after the Chalko judgment had become final, the California Legislature adopted Civil Code section 5124, effective January 1, 1984, the full text of which has been set forth above. The statute authorized the modification of "[c]ommunity property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983" to permit "a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983."

I. The 1985 Proceedings To Modify the 1982 Final Judgment

1. *The Order To Show Cause*

On August 29, 1985, respondent Sharon E. Chalko obtained an order to show cause for modification of the 1982 interlocutory judgment of dissolution of marriage pursuant to former California Civil Code section 5124. In her application for the order to show cause, Sharon Chalko sought, *inter alia*, the following relief:

> "1. Determination that the military retirement of Respondent [Bruno G. Chalko] is a community property asset of the marriage between the parties and order that Petitioner be entitled to one-half of the community property in Respondent's military retirement.
>
> "2. Determination that Petitioner [Sharon E. Chalko] is entitled to her share of Respondent's military retirement benefits upon their becoming vested." (Brackets added.)

2. *The Hearing, Judgment and Appeal*

On November 20, 1986, the order to show cause came on for hearing before the San Bernardino County Superior Court in Barstow. After hearing argument but taking no evidence, the superior court in Barstow took the matter under submission and informed the parties that they would be advised by mail as to the ruling. On December 12, 1985, the superior court ruled in relevant part as follows:

> "The court finds that pursuant to Civil Code § 5124, petitioner has a community interest in respondent's [Bruno Chalko's] military retirement. Further, petitioner [Sharon Chalko] is entitled to her share of respondent's retirement benefits upon their vesting and the court reserves jurisdiction on this issue." (Brackets added.)

On June 10, 1986, the superior court judge signed an order modifying the final 1982 judgment dissolving the Chalko marriage pursuant to Civil Code section 5124. Under this modification, Sharon Chalko was awarded 30.415% of appellant Bruno Chalko's Marine Corps retired pay. It should be noted that the order modifying the 1982 judgment was not signed and filed until after Civil Code section 5124 had been repealed by its own terms.

Appellant Bruno Chalko took a timely appeal to the California Court of Appeal for the Fourth Appellate District, Division Two, which sits in San Bernardino, California. The Court of Appeal rejected the three federal constitutional claims raised in this jurisdictional statement. It affirmed the trial court order on all issues "except the date on which the payments to Sharon are to begin, Sharon's proportional interest in those payments, and the amount of retirement pay to which Bruno will be entitled at that time." App. 14-16. In short, not only did the California Court of Appeal reject appellant Chalko's constitutional claims but on its own motion ordered the trial court to again reconsider its modification so that respondent Sharon Chalko may be awarded an even larger share of the retired pay awarded to appellant by the final 1982 judgment enforcing the Marital Settlement Agreement.

Review of a civil case by the California Supreme Court is discretionary and was denied on January 6, 1988.

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THERE ARE THREE SUBSTANTIAL QUESTIONS PRESENTED IN THIS CASE

I

FORMER CIVIL CODE SECTION 5124 IMPAIRED THE OBLIGATION OF CONTRACT IN THIS CASE

The United States Constitution prohibits the enactment of state laws impairing the obligation of contracts. U.S. Const., art. I, § 10, cl. 1. The Contract Clause does not permit a state legislature to interfere with a contractual right to recover money. *Coombes v. Getz*, 285 U.S. 434, 448 (1932).

A. The 1982 Chalko Judgment Was a Contract Protected by the Federal Contract Clause

Under California law, the Marital Settlement Agreement executed by the Chalkos in 1982 was a contract. As was stated in *In re Marriage of Doud*, 181 Cal.App.3d 510, 519, 226 Cal.Rptr. 423 (1986), "A husband and wife may contract to allocate their property so as to avoid a judicial resolution of its status and, subject to approval of the family law court, may incorporate the agreement in a judgment."

Moreover, the judgment in this case was a "contract" for purposes of contract clause analysis. In *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 432 (1934), this Court held that a judgment enforcing contract obligations was a contract whose impairment could violate the federal contract clause. In *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal.2d 344, 363, 139 P.2d 908 (1943), the California Supreme Court held that "Ordinarily the judgment of a

court may not be modified or altered by legislative action . . . because a judgment is a form of contract protected by the contract and due process clauses of the state and federal Constitutions." (Citations omitted.)

B. A State May Temporarily Impair Contract Rights Only If Four Prerequisites Are Satisfied

In *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), this Court identified four factors which must exist before a state may constitutionally impair vested contract rights through legislation. Those factors are:

> (1) The state law must be enacted to protect a basic societal interest, not a favored group. 290 U.S. at 444.
>
> (2) The relief must be appropriately tailored to the emergency that it was designed to meet. *Id.*
>
> (3) The imposed conditions must be reasonable. *Id.* at 445-447.
>
> (4) The legislation must be limited to the duration of the emergency. *Id.* at 447.

Writing for the Court in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) Justice Stewart observed:

> "The *Blaisdell* opinion thus clearly implied that if the Minnesota moratorium legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause of the Constitution." (Footnote omitted.)

C. Former Civil Code Section 5124 Worked a Substantial Impairment of Appellant Bruno Chalko's Vested Contract Rights Under the 1982 Final Judgment

Allied Structural Steel teaches that, in applying Contract Clause principles to the present case involving impairment of judgments and underlying marital settlement agreements by operation of California Civil Code section 5124, "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." 438 U.S. at 244. Making this inquiry in the present case, one must conclude that there is a substantial impairment of appellant Bruno Chalko's rights under the 1982 interlocutory judgment and the underlying settlement agreement.

First of all, a final property settlement was set aside despite the reasonable expectations of all parties that it was final. Secondly, the confirmation of appellant Bruno Chalko's military retired pay as his separate property has been permanently (not temporarily) impaired—that retired pay is now to be divided with his ex-wife despite his reasonable expectation that he could rely upon a final judgment. Thirdly, the impairment is aggravated by the fact that the former Mrs. Chalko retains an award of her pension rights intact. Thus, former Civil Code section 5124 operated in this case to nullify the express terms of the judgment and underlying settlement agreement as to the confirmation of appellant Bruno Chalko's military retired pay as separate property, and it imposes a completely unexpected liability on appellant Bruno Chalko who was entitled to rely upon the final judgment in 1982

as conclusively establishing the rights and obligations of the parties under the law.

D. Former Civil Code Section 5124 Was Not Enacted To Protect a Broad Societal Interest

Former Civil Code section 5124 can hardly be characterized, as was the mortgage moratorium law in *Blaisdell*, as a law enacted to protect a broad societal interest rather than that of a narrow class. In *In re Marriage of Carpenter*, 188 Cal.App.3d 604, 609, 231 Cal.Rptr. 783 (1986), the Court of Appeal observed as follows about the purpose of former section 5124: ". . . the California Legislature intended to eliminate the possibility that a spouse's recovery of a community interest in a pension simply because the case by chance fell into the gap between *McCarty* and the effective date of the FUSFSPA." Clearly, a statute designed to aid *only ex-spouses of military personnel who were parties to final judgments dividing marital property between June 26, 1981, and February 1, 1983*, is legislation for the benefit of a narrow class.

It was suggested in *Marriage of Carpenter* that the state's "paramount interest" in the equitable distribution of marital property upon dissolution of the marriage points to section 5124 as proper exercise of the police power. *In re Marriage of Carpenter, supra*, 188 Cal.App. 3d at 613. This argument misses its mark. The state's interest in the equitable distribution of marital property ends when a final judgment is entered. If the courts have made a mistake in the distribution process, the remedy is appeal. If, however, the judgment is a final judgment, the paramount interest of the state is in enforcing the policy behind the doctrine of res judicata.

After the *McCarty* decision, the California courts held that military retirees were not entitled to modifications of final judgments on the basis of the "change in the law" wrought by the *McCarty* decision, to wit: that their retired pay was not subject to division as community property. *See, e.g., In re Marriage of Fellers*, 125 Cal.App.3d 254, 256-258, 178 Cal.Rptr. 35 (1981). In *Fellers*, the retiree's ex-wife had been awarded 40% of the military retired pay as community property. The retiree brought a motion for an order modifying the judgment to declare the retired pay to be his sole and separate property. The Court of Appeal affirmed the trial court's denial of the motion to modify on the ground that "a judgment will not be denied res judicata effect just because the law on which it was based has since been changed." *Id.* at 257.

Fellers cited the California Supreme Court's opinion in *Slater v. Blackwood*, 15 Cal.3d 791, 797, 126 Cal.Rptr. 225, 543 P.2d 593 (1975) for the propositions that (1) the California courts have repeatedly refused to treat the self-evident hardship occasioned by a change in the law as a reason to revive dead actions and (2) public policy requires an end to litigation and even erroneous final judgments must be honored in order to continue the well ordered functioning of the judicial process. The *Fellers* opinion then stated:

> ". . . To permit such adjudications which have long since become final to be reopened so as to award military retirement pay to the husband as his separate property would flaunt the rule of res judicata, upset settled property distributions on which parties have planned their lives, and unsettle judgments entered as long as 40 years ago. (Citation omitted.) The consequences would be devastating, not only from the

standpoint of the litigants but in terms of the workload of the courts. . . ." *Fellers, supra*, 125 Cal.App.3d at 257-258.

In light of the precedents set in *Slater* and *Fellers*, it is readily apparent that California had no "paramount interest" in equitable distribution after a court has fully performed its function and a final judgment has been entered. Indeed, the "paramount interest" was a broad societal interest in the finality of litigation. Thus, California cannot justify the enactment of former Civil Code section 5124 on the basis of a "paramount interest" in reopening and modifying final judgments previously dividing marital property in order to award a portion of a military retired pay to an ex-wife at a later date.

In *Allied Structural Steel, supra*, this Court found a Contract Clause violation because:

> "This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. (Citation.) It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the state."

In this case, former Civil Code section 5124 violates the Contract Clause for most of the reasons that the Minnesota statute in *Allied Structural Steel* was held unconstitutional. It was not enacted to deal with "a broad, generalized economic or social problem." Considered in the light of previously settled *Slater v. Blackwood* rule, the State of California entered into a new area—that of

reopening judgments because of a change in the law. In a further comparison to *Allied Structural Steel*, it should be noted that the narrow class of employers affected there (see 438 U.S. at 250) bears a striking similarity to this case when one considers the class benefited by Civil Code section 5124 is correspondingly narrow.

E. There Was No Great National or State Emergency Which Warranted the Enactment of Civil Code Section 5124

In *Allied Structural Steel, supra*, the United States Supreme Court held that the Minnesota legislation there under review ". . . was not enacted to deal with a situation remotely approaching the broad and desperate emergency conditions of the early 1930's—conditions of which the Court in *Blaisdell* took notice." 438 U.S. at 249.

W. B. Worthen Co. v. Thomas, supra, 292 U.S. at 433, interpreted the *Blaisdell* decision as follows:

> ". . . We said that the constitutional prohibition should not be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood or earthquake, and that the State's protective power could not be said to be non-existent when the urgent public need demanding relief was produced by other and economic causes. But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Id.* at 433.

In the instant case, former Civil Code section 5124 violates the Contract Clause because no broad or desperate

emergency conditions compelled its enactment. Perceived unfairness to a limited group of ex-spouses of military retirees is not an emergency of any kind, let alone one on a par with an economic depression, fire, flood, or earthquake.

F. The Enactment Was Neither Appropriate for the Emergency Nor Temporary in Effect

Former California Civil Code section 5124 could not satisfy the third factor under the *Blaisdell* test because there was no "emergency" in the constitutional sense. Hence there could be no tailoring of the statute in a manner appropriate to the emergency.

In addition, section 5124 did not effect "simply a temporary alteration of the contractual relationships" involved: rather it authorized permanent alteration of appellant Bruno Chalko's separate property rights to his military retired pay.

In *Allied Structural Steel, supra*, this Court held that the Minnesota legislation involved in that case violated the Contract Clause because "It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively." 438 U.S. at 250. Hence a legislative enactment impairing vested contract rights must be a temporary measure during the existence of which enactment the vested contract rights are not lost but merely deferred for a brief period.

In this case, appellant Bruno Chalko's vested contract rights have been impaired *permanently and forever.*

Respondent Sharon Chalko will receive a portion of his military retired pay for as long as Bruno receives such pay. His contract rights have not been "merely deferred for a brief period"; they have been irrevocably and permanently altered. There is nothing temporary about the effect of former California Civil Code section 5124 here. The modified judgment authorized by section 5124 takes away a portion of appellant Bruno Chalko's Marine Corps retired pay forever and awards that portion to his ex-wife, whereas under the 1982 final judgment he was entitled to the entirety of his retired pay as separate property.

The only temporary aspect of former Civil Code section 5124 is the fact that it was effective for only a two-year period. During that two year period, it worked permanent modifications of final settlement agreement and final judgments which are protected by the federal Contract Clause and which should have been protected by the California courts.

G. The California Supreme Court Has Followed the Approach of the Court of Appeal in This Case and Has Not Followed Its Own Settled Interpretation of the Federal Contract Clause

The Court of Appeal opinion in the instant case was filed on October 20, 1987. On October 29, 1987, the California Supreme Court decided *In re Marriage of Barnes*, 43 Cal.3d 1371, 240 Cal.Rptr. 855, 743 P.2d 915 (1987). The *Barnes* opinion quoted the Court of Appeal opinion in *In re Marriage of Doud*, *supra*, 181 Cal.App.3d at 517-518, with approval as to the legislative intent behind former California Civil Code section 5124:

> " '. . . [T]he California law of finality of judgments operated to insulate the application of the community property laws of cases which became final by virtue of judgments and stipulations consummated during the period between *McCarty* and FUSFSPA. (Citations omitted.) To redress this anomaly the Legislature enacted section 5124' ". 43 Cal.3d at 1377.

The California Supreme Court went on to conclude that the change in the law of finality of judgments was within the power of the Legislature, subject to the constraints of the federal and state constitutions. *Id.* The *Barnes* opinion concluded that there was no due process bar to application of former Civil Code section 5124, stating as follows:

> ". . . No subtle balancing is required to conclude that the statute is a proper exercise of the police power. As in *Bouquet* [*In re Marriage of Bouquet*, 16 Cal.3d 583, 128 Cal.Rptr. 427, 546 P.2d 1371 (1976)], the state's interest in remedying the 'rank injustice' of the situation and in achieving an equitable dissolution of the marital relationship justifies such retroactive application. (Citation omitted.)" *Id.* at 1377-1378.

The California Supreme Court then found that the Barnes judgment awarding military retired pay to the husband had been "pursuant to an agreement reached by the parties." It concluded that "Whether a contract is impaired in the constitutional sense depends upon the public interest in, and the reasonableness and necessity of the legislative action." *Id.* at 1378. Without considering any of the federal contract clause precedents discussed in this jurisdictional statement, the California Supreme Court asserted that ". . . the analysis is similar to that involved in the determination of whether a retroactive

statute violates due process by impermissibly impairing vested rights," and then held that "For the same reasons that section 5124 does not violate the due process clause, it does not violate the contract clause." *Id.*

In earlier decisions not involving the division of military retired pay, the California Supreme Court has manifested a clear understanding of federal contract clause principles. In *Olson v. Cory*, 27 Cal.3d 532, 539, 178 Cal. Rptr. 568, 636 P.2d 532 (1980), the California Supreme Court recognized quite clearly the four factors identified by the United States Supreme Court in *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), which permit legislative impairment of vested contract rights. Those factors are: (1) the enactment serves to protect basic interests of society, (2) there is an emergency justification for the enactment, (3) the enactment is appropriate for the emergency, and (4) the enactment is designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the temporary deferment. *See also, Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 305-306, 152 Cal.Rptr. 903, 591 P.2d 1 (1979).

The application of proper contract clause analysis by California courts in cases outside the family law context is indicative of a thinly disguised judicial animus toward this Court's reversal of California precedents in the *McCarty* decision. As the California Supreme Court put it in the recent *Barnes* opinion, the fact that *McCarty* was the law for some eighteen months was "rank injustice." 43 Cal.3d at 1377. It was such "rank injustice" that it

justified ignoring this Court's decisions under the contract clause to permit permanent legislative impairment of any and all final judgments based on contractual settlement agreements which awarded military retired pay to the husband as separate property between June 25, 1981, and February 1, 1983.

H. The Contract Clause Question Is Not Only a Substantial Federal Question But Also One Ripe for Summary Reversal

Summary reversal is a disposition "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Appellant Bruno Chalko submits that this case is the paradigm for summary reversal. The contract clause precedents of this Court are well settled and should inexorably compel a conclusion that former California Civil Code section 5124 has unconstitutionally impaired the obligation of contract in this case.

If this Court does not summarily reverse or note probable jurisdiction in this case, its effect will be a decision on the merits that the California courts have been correct in their treatment of the constitutional issues raised here. Summary affirmances and dismissals of appeals are treated as rulings on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975). It will mean that clear circumvention of the United States Constitution by the California courts in cases involving a discrete class of retired American servicemen will have been ignored

and unredressed in the very forum which should be the champion of their constitutional rights.

II

FORMER CIVIL CODE SECTION 5124 ALSO DEPRIVED APPELLANT BRUNO CHALKO OF HIS SEPARATE PROPERTY WITHOUT DUE PROCESS OF LAW

Appellant Bruno Chalko further contends that former Civil Code section 5124 operated as a taking of his vested separate property rights in his military retired pay without due process of law under the due process clause of the Fourteenth Amendment to the United States Constitution. Those rights had been adjudicated in a final judgment and were not susceptible to divestment without due process of law, including just compensation.

It has long been the rule that a legislature may not take away rights which have been once vested by judgment; legislation may act on subsequent proceedings or may abate pending actions, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. *McCullough v. Virginia*, 172 U.S. 102, 123-124 (1898). In other words, a legislature cannot take away rights which have been once vested by a judgment. The private rights of parties which have vested by the judgment of a court cannot be taken away by subsequent legislation, but must thereafter be enforced by the court regardless of such legislation. *Hodges v. Snyder*, 261 U.S. 600, 603 (1923).

Under this Court's interpretation of the due process clause of the Fourteenth Amendment, appellant has found

no precedent which authorizes the setting aside of a final judgment because a state legislature supported by its own state courts perceives the result in prior litigation to be a "rank injustice." In its recent *Barnes* opinion, the California Supreme Court referred to the fact that *McCarty* was the law for some eighteen months as "rank injustice." 43 Cal.3d at 1377. It was such "rank injustice" that it justified not only ignoring this Court's decisions under the contract clause but also ignoring its own California cases decided on due process grounds.

In *In re Marriage of Buol*, 39 Cal.3d 751, 763, 218 Cal.Rptr. 31, 705 P.2d 354 (1985), the California Supreme Court concluded that retroactive application of Civil Code section 48.1 would substantially impair, without due process of law, a wife's vested property right created by oral agreement that the family home was her separate property. The Court stated:

> "The state interest in equitable dissolution of the marital partnership is not furthered by retroactive effect. Retroactivity only serves to destroy Esther's legitimate separate property expectations as a penalty for lack of prescience of changes in the law occurring after trial. Due process cannot tolerate such a result." *Id.* at 763-764.

The California Supreme Court concluded that the manifest interest in finality pervading the sensitive area of family law was thwarted by retroactive application of the statute. "The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then-applicable law." Dissenting opinion of Justice Simms in *In re Marriage of Taylor*, 160 Cal.App.3d 471, 479, 206 Cal.Rptr. 557 (1984), quoted with approval in *Buol, supra*.

39 Cal.3d at 763, which incidentally overruled the majority opinion in *Taylor*.

If retroactivity destroying the wife's legitimate separate property expectations as a penalty for lack of prescience of changes in the law occurring after trial constituted a violation of due process in *Buol*, former Civil Code section 5124 which destroys appellant Bruno Chalko's legitimate separate property interest in this case must run afoul of due process in a similar manner. With respect to family law judgments, California has manifestly applied one standard of due process when the wife's interests are at stake and a completely different standard when the husband's interests are at stake.

It is thus clear from the foregoing facts that appellant Bruno Chalko has been unconstitutionally deprived of his separate property rights under the 1982 judgment without due process of law. A summary reversal (or a notation of probable jurisdiction) is appropriate on this due process ground as well.

III

FORMER CIVIL CODE SECTION 5124 DENIED APPELLANT BRUNO CHALKO EQUAL PROTECTION OF THE LAWS

This case also presents a substantial question as to whether former Civil Code section 5124 has denied equal protection of the laws to military personnel whose rights to their retired pay have been finally adjudicated by California courts between June 26, 1981, and February 1, 1983, a class of which appellant Bruno Chalko is a member. Such a denial of equal protection of the laws vio-

lates the Fourteenth Amendment to the United States Constitution.

After the *McCarty* decision, *supra*, the California courts held that military retirees were not entitled to modifications of final judgments on the basis of the "change in the law" wrought by the *McCarty* decision, to wit: that their retired pay was not subject to division as community property. *See, e.g., In re Marriage of Fellers*, 125 Cal.App.3d 254, 256-258, 178 Cal.Rptr. 35 (1981). *Fellers* cited the California Supreme Court's opinion in *Slater v. Blackwood*, 15 Cal.3d 791, 797, 126 Cal.Rptr. 225, 543 P.2d 593 (1975) for the propositions that (1) the California courts have repeatedly refused to treat the self-evident hardship occasioned by a change in the law as a reason to revive dead actions and (2) public policy requires an end to litigation and even erroneous final judgments must be honored in order to continue the well ordered functioning of the judicial process. Cal.App.3d at 257-258.

Presumably, equal protection of the law should mean equal treatment when the tables are reversed. If the military husband in California family law proceedings could not reopen a final judgment to take advantage of the "change in the law" wrought by *McCarty*, does not equal protection of the laws demand that the ex-spouse not be able to obtain a modification based on the "change in the law" wrought by the enactment of the federal Uniformed Services Former Spouses Protection Act (FUSFSPA), which became effective February 1, 1983?

Since *Slater v. Blackwood*, *supra*, was the law of California as it existed before June 26, 1981 (*Slater* was decided in 1975), California Civil Code section 5124 could

have been interpreted as permitting no modifications whatsoever because a "change in the law" does not justify reopening. But since the Legislature obviously intended to permit some modifications, the issue is squarely presented as to whether this statute denied equal protection of the laws to those husbands who obtained final judgments between June 26, 1981, and February 1, 1983, and then had their judgments set aside for purposes of dividing finally adjudicated rights of military retired pay.

On the one hand, the California judicial branch has declined to reopen final judgments because of a judicial change in the law (*McCarty*) in favor of military retirees. On the other hand, the California legislature has authorized the reopening of final judgments to effect a change in the law which it perceives to have occurred in a subsequent federal act. The only rationalizing principle for the two results is that the military husband always loses. In equal protection analysis in this case, treatment by the courts and by the legislature must be viewed as a unified treatment of persons similarly situated by the same state government.

The concept of equal justice under law requires the State to govern impartially. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed v. Reed*, 404 U.S. 71, 76 (1971). Specifically, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Lehr v. Robertson*, 463 U.S. 248, 266 (1983). Since California

does not normally set aside final judgments even for "rank injustice," one must conclude that former section 5124 was special legislation offensive to the equal protection clause of the Fourteenth Amendment. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

Appellant Bruno Chalko submits that the denial of equal protection of the laws in this case is a third substantial question for appeal. A summary reversal (or at least a notation of probable jurisdiction) is warranted on this issue also.

IV

THERE ARE NO PROCEDURAL BARRIERS TO CONSIDERATION OF THIS APPEAL ON ITS MERITS

Although this case arises in the family law context, it squarely presents the three issues regarding the constitutionality of former California Civil Code section 5124 which has permitted the reopening of final judgments and the modification of pre-existing marital settlement contracts. This Court has generally recognized that the whole subject of domestic relations of husband and wife belongs to the laws of the States and not to the laws of the United States. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 59 L.Ed.2d 1, 99 S.Ct. 802, 808 (1979). It should be pointed out that, while this case has arisen in the family law context, the issues raised here are federal constitutional issues involving a state statute which operates to reopen final judgments and the contracts of parties as reflected in finalized marital settlement agreements. A decision in this case which does not require this Court to decide a state domestic relations issue of any kind.

Likewise, the fact that former California Civil Code section 5124 has now been repealed, should not militate against summary reversal or a notation of probable jurisdiction in this case. The mischief of the statute remains with respect to appellant Bruno Chalko and other military personnel who obtained an award of their retired pay as separate property in marital settlement agreements and final judgments between the date of the *McCarty* decision and the effective date of FUSFSPA.

Finally, appellant Bruno Chalko acknowledges that there will be further proceedings in the trial court to determine how big a share of his Marine Corps retired pay the California superior court will award to his ex-wife. These further proceedings will not affect the finality of the California Court of Appeal's decision on the federal constitutional issues raised here with respect to former California Civil Code section 5124. The outcome of those proceedings will be a foregone conclusion: there will be an award of a portion of Bruno's retired pay to Sharon and a new modified judgment entered. A California appeal from that new judgment cannot consider the constitutional issues raised here because they will have become law of the case by virtue of the present Court of Appeal decision. Under these circumstances, appellant submits this case is one in which, even though there will be further proceedings in the state courts, the judgment on the federal issues is deemed to be final because "the outcome of further proceedings [is] preordained. . . ." *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 479 (1975).

———o———

CONCLUSION

For the foregoing reasons, appellant Bruno G. Chalko urges this Court to reverse the California Court of Appeal summarily *or* to note probable jurisdiction of this appeal. In the alternative, appellant urges this Court to treat this jurisdictional statement as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103 and to grant certiorari.

Dated: March 17, 1988.

Respectfully submitted,

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APPENDIX CONTAINING OPINIONS, JUDGMENTS AND NOTICE OF APPEAL

OPINION OF CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION TWO

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re the Marriage of SHARON E. and BRUNO G. CHALKO	)	E003455
	)	(Super.Ct.No. BFL-1783)
SHARON E. CHALKO,	)	
Respondent,	)	O P I N I O N
v.	)	
BRUNO G. CHALKO,	)	(Filed Oct. 20, 1987)
Appellant.	)	

APPEAL from the Superior Court of San Bernardino County. Rufus L. Yent, Judge. Affirmed with directions.

Russell Iungerich for Appellant.

Dennis S. Tilton for Respondent.

This appeal raises the question of the effect of the repeal of Civil Code section 5124 on cases which were pending under that section at the time of repeal, and also challenges the constitutionality of section 5124. Lastly, appellant contends that the trial court abused its discretion in failing to reopen a 1982 property settlement agree-

ment between the parties in light of that court's disposition of the issues at trial. We hold for respondent on all issues but remand the case to the lower court with directions to clarify its order on the issue of when the payment of pension benefits to respondent is to begin.

FACTS

Appellant Bruno Chalko and respondent Sharon Chalko were married May 2, 1969. They separated on September 3, 1981, and entered into a property settlement agreement on May 13, 1982. The property settlement agreement was incorporated by reference into the interlocutory judgment of dissolution which was entered on June 7, 1982.

Except for a period of several months between tours of duty, appellant Bruno was on active duty with the U.S. military during the entire marriage. The property settlement agreement listed as Bruno's separate property "Military pension rights earned by Husband," and awarded those pension rights to Bruno.

On August 29, 1985, following enactment of Civil Code section 5124, Sharon filed an Order to Show Cause seeking modification of the judgment of dissolution to give her an interest in Bruno's military pension pursuant to section 5124. Following a hearing, the trial court held that Sharon did have a community property interest in Bruno's military pension and awarded a proportional interest to Sharon to be paid at a time specified in the order. Bruno now appeals from that order.

PROCEDURAL HISTORY

Civil Code section 5124 was enacted by the legislature in an attempt to bridge a gap in the law.

Prior to June 26, 1981, case law in California had established that pensions, including federal military pensions, were community property which was divisible on divorce. (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596, cert. den. 419 U.S. 825, rehg. den. 419 U.S. 1060, overruled on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14.) On June 26, 1981, the U.S. Supreme Court held that community property rules of individual states were preempted by federal law, and that there was to be no division of federal military pensions by state courts unless such division was authorized by Congress. (*McCarty v. McCarty* (1981) 453 U.S. 210, 235-236.)

In response to the *McCarty* decision, Congress passed the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) which authorized division of military pensions pursuant to state law "for pay periods beginning after June 25, 1981." (10 U.S.C. § 1408(c)(1).) That federal provision did not take effect until February 1, 1983, however, and California courts refused to apply it retroactively to state dissolution judgments which had become final between *McCarty* and the effective date of FUSFSPA. (See *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, 360; *In re Marriage of Fairfull* (1984) 161 Cal.App.3d 532, 535; *Mueller v. Walker* (1985) 167 Cal.App.3d 600, 605.)

To deal with agreements and judgments which had become final during that "window" period, the California

legislature enacted Civil Code section 5124, which took effect January 1, 1984. The statute provided that "[c]ommunity property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits . . . " in a manner consistent with present state law.

Subdivisions (c) and (d) of Civil Code section 5124 provided: "(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986. [¶] (d) This section shall remain in effect only until January 1, 1986, and on that date is repealed. . . ." Sharon brought her action in August, 1985, and the hearing was held in November, 1985. On December 12, 1985, the trial court issued a minute order finding for Sharon, but the final order was not signed until June 10, 1986, by which time section 5124 was no longer in effect.

DISCUSSION

I

EFFECT OF REPEAL ON TRIAL COURT'S ORDER

Bruno's first contention on appeal is that the repeal of section 5124 on January 1, 1986, renders the order signed June 10, 1986, null and void. At trial, Bruno raised no objection to Sharon's characterization of section 5124 as "the enabling section" which permits modification of decrees if the modification action was filed prior to January 1, 1986. On appeal, however, he argues that the order granting modification of the decree had to be final as of January 1, 1986, in order to be valid. Although we have some question as to whether the issue is properly before

this court, "giving [appellant] the benefit of the doubt we shall discuss the merits of those contentions raised on appeal which do in fact present 'purely legal' issues." (*Sea & Sage Audubon Society, Inc. v. Planning Commission of the City of Anaheim* (1983) 34 Cal.3d 412, 417.)

Bruno offers in support of his position the general principle that " 'where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause.' [Citations.]" (*Estate of Taylor* (1973) 33 Cal.App.3d 44, 50.)

Application of this rule has been tempered, however, by a broad interpretation of what is sufficient to save rights under a statute. "It is not necessary that there be an express saving clause in order to save rights under a statute. It is sufficient if an intent to that effect appear by legislative provision at the session of the Legislature effecting the repeal of the statute from which the rights are to be saved." (*County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 198. Accord, *Traub v. Edwards* (1940) 38 Cal.App.2d 719 [holding that a provision requiring that suit under a repealed statute be "commenced" within 60 days was sufficient to permit application of the repealed statute to a suit pending during that period].)

The statute under consideration in the present case contained, in the text of the statute itself, an indication that the legislature intended the statute to apply to proceedings which had been initiated before January 1, 1986, even if those proceedings were not final as of that date.

Subdivision (c) of section 5124, quoted above, required that proceedings under that section "be brought" before January 1, 1986. Effect must be given to statutes "'"'according to the usual, ordinary import of the language employed in framing them.' [Citations.]"'" (*People v. Belleci* (1979) 24 Cal.3d 879, 884.) Only if this court interprets the phrase "shall be brought" to mean "shall be final" would the meaning of the statute be as Bruno claims. In the present case, the plain meaning of the words is consistent with all other indications of the legislative intent.

Courts have a duty to adopt a construction which will further the purpose which the legislature sought to promote in enacting the statute. (*Klarfield v. Berg* (1981) 29 Cal.3d 893, 900.) The purpose of section 5124 is apparent from both the text of the sattute and the context in which it was enacted. It was enacted following a determination by California courts that the FUSFSPA did not apply to decisions which were final before the effective date of the FUSFSPA. It permitted modification of only those decisions which were final during the "window period." It was in effect for only a short period—January 1, 1984 to January 1, 1986—and required that proceedings under it be brought during that time. Reading into the statute a requirement that decisions had to be final as of the date of repeal would greatly limit the effect of the statute because of the time necessarily involved in pursuing a remedy in the courts. It would have the effect of precluding appeal of any decision under section 5124 because of the risk that such appeal would not be final by the date of repeal. Further, one of the policy considerations underlying the general rule cited by Bruno—that a right created

solely by statute is subject to repeal at any time by the legislature—would not apply in this case. (*Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819, 829.) Here, the date of repeal was included in the statute itself so did not reflect a subsequent decision by the legislature that the statute should not apply.

We hold, therefore, that section 5124 may be applied to proceedings begun before January 1, 1986, even if they were not final on that date.

It should be noted that our holding on this issue is in harmony with the views of all the courts which have issued opinions since January 1, 1986, construing section 5124. While the question has not been discussed in any of those decisions, the power to act has necessarily been assumed by all the reviewing courts. (See, e.g., *In re Marriage of Doud* (1986) 181 Cal.App.3d 510; *In re Marriage of Castle* (1986) 180 Cal.App.3d 206; *In re Marriage of Potter* (1986) 179 Cal.App.3d 73; *In re Marriage of Downes* (1986) 177 Cal.App.3d 205.)

II

NO UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT

Bruno next argues that Civil Code section 5124 unconstitutionally impairs the obligation of contract in violation of both the federal and California constitutions. Bruno raises this and other constitutional issues for the first time on appeal. Because these are questions of law raised by the undisputed facts in the case we will consider the questions on their merits. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Tyre v. Aetna Life Insurance Company* (1960) 54 Cal.2d 399, 405.)

Several appellate decisions have already reviewed the question of whether section 5124 impermissibly interferes with the obligation of contracts in violation of the contract clauses of the federal and California constitutions. Those decisions have uniformly held that it does not. (See *In re Marriage of Potter, supra,* 179 Cal.App.3d at p. 84; *In re Marriage of Doud, supra,* 181 Cal.App.3d at p. 522; *In re Marriage of Carpenter* (1986) 188 Cal.App.3d 604.)

"The analysis is similar to that involved in the determination whether a retroactive statute violates due process by impermissibly impairing vested rights. [Citations.] Both questions involve an inquiry whether the state has unreasonably deprived an individual of a property right." (*In re Marriage of Doud, supra,* 181 Cal. App.3d at p. 520.) The court in *Doud* went on to state that "whether a contract is impaired in the constitutional sense depends upon the public interest in and the reasonableness and necessity of the legislative action." (*Ibid.*)

As with the due process analysis, the court must balance the interests of the state against the extent of the interference with private rights. One court reviewing section 5124 concluded that the "paramount interest" of the state in the equitable distribution of marital property upon dissolution "clearly outweighs the interference with [a party's] rights under the contract. Section 5124 was appropiately tailored and limited to the situation necessitating its enactment." (*In re Marriage of Potter, supra,* 179 Cal.App.3d at p. 84.)

The court in *In re Marriage of Carpenter, supra,* 188 Cal.App.3d at p. 614, narrowed the holding of *Potter,* adding that the inquiry cannot stop with examination of the

statute alone but must also take into consideration the particular contract involved. In *Carpenter*, as in the present case, the contract was a property settlement agreement which had been incorporated into a final judgment. The court in *Carpenter* concluded that there was "no evidence before the trial court that modification would result in a substantially unequal division of the remainder of the marital property," and upheld the modification of the final decree under section 5124. (*Id.* at p. 615.) We approve the reasoning of the court in *Carpenter*, and reach the same conclusion in the case before us.

III

NO UNCONSTITUTIONAL VIOLATION OF EQUAL PROTECTION

Bruno claims further that section 5124 unconstitutionally denies equal protection of the laws to the class of military personnel whose rights to their retirement benefits had been decided in dissolution proceedings which became final between June 26, 1981, and February 1, 1983. Bruno, in his argument, claims only that the treatment under the statute differs from the treatment this class of individuals would have received had there been no section 5124. Thus, he cites *In re Marriage of Fellers* (1981) 125 Cal.App.3d 254, which held that a final marital dissolution proceeding which treated a military pension as community property could not be reopened by the courts following the U.S. Supreme Court decision in *McCarty*, and argues that Sharon should not be permitted to seek modification of the judgment in this case.

In the absence of section 5124, Bruno's claim would be legitimate. In the present case, however, we are dealing

with a statute which specifically authorizes the treatment in question. The inquiry thus must focus on the statute itself, including the nature of the classifications involved and the interests infringed upon, balanced against the state interests served by the legislation. " 'In the typical equal protection case the classification need only bear a rational relationship to a conceivable legitimate state purpose . . . .' [Citations.]" (*Fullerton Joint Union High School District* v. *State Board of Education* (1982) 32 Cal. 3d 779, 798-799.) There is a higher standard to be met when the legislation involves "suspect classifications" or infringes on "fundamental interests," but Bruno has made no showing here of any facts that would require examination of the legislation under the "strict scrutiny" standard. *(Ibid.)*

The classification under section 5124 meets the constitutional standard. The class of those affected by the legislation is very directly related to the purpose of the legislation, which was to promote the state's "paramount interest in the equitable distribution of marital property upon dissolution"; and that state purpose has long been recognized as being a legitimate concern of the state. *(In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 593.)

Bruno has not demonstrated any denial of equal protection under section 5124.

IV

NO UNCONSTITUTIONAL VIOLATION OF DUE PROCESS

Bruno next argues that section 5124 deprives him of vested property without due process of law in violation of the constitutions of the United States and California. We hold this contention also to be without merit.

The standard to be applied in deciding whether a retroactive statute violates due process was set forth in *In re Marriage of Buol* (1985) 39 Cal.3d 751. There the court stated: "In determining whether a given provision contravenes the due process clause we look to 'the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.' " (39 Cal.3d at p. 761, quoting *In re Marriage of Bouquet, supra,* 16 Cal.3d at p. 592.)

This test has been applied to section 5124 by several appellate courts and the section has been found not to violate due process. (*Mueller* v. *Walker, supra,* 167 Cal. App.3d at p. 609; *In re Marriage of Potter, supra,* 179 Cal. App.3d at p. 82.) In *Mueller* v. *Walker* the court stated: "In determining whether Civil Code section 5124 contravenes the due process clause, we must consider inter alia the significance of the state interest served and the importance of retroactive application to effectuate that interest. [Citations.]

"We conclude the language of this section as well as its legislative history leave no doubt that any property divisions made in reliance upon the *McCarty* decision which became final before the effective date of FUSFSPA are susceptible to redivision as community property so long as action is taken before the scheduled repeal date. . . .

"Here, no subtle balance is required for the legislative intent is patent, clear, explicit, and the state's 'paramount

interest' in the equitable distribution of marital property upon dissolution of the marriage points to section 5124 as proper exercise of the police power. . . ." (167 Cal. App.3d at pp. 608-609 fn. omitted.)

We agree with the reasoning and the conclusion reached by the court in *Mueller* v. *Walker, supra,* and hold that section 5124 does not violate the due process clause of either the state or the federal constitution.

V

NO ABUSE OF DISCRETION BY THE TRIAL COURT IN FAILING TO REOPEN THE PROPERTY SETTLEMENT AGREEMENT OF 1982

Bruno contends that the trial court abused its discretion in granting relief under section 5124 without reopening the entire 1982 property settlement agreement. He supports this position with extensive discussion of the role of the property settlement agreement in dissolution judgments, but fails to discuss the impact of section 5124 on modification of those judgments or to show an abuse of discretion in the trial court's application of section 5124.

Bruno again seeks review on the grounds that the question presents purely a question of law. We will consider the merits of Bruno's claim that as a matter of law the trial judge abused his discretion in granting relief under section 5124 without reopening the property settlement agreement.

"Section 5124 only confers authority to modify to include a division of military retirement benefits." (*In re Marriage of Doud, supra,* 181 Cal.App.3d at p. 524.) There is no authorization in the statute for a court to

reopen other aspects of the agreement, judgment or decree. The discretion available to the trial court involves only the decision of whether or not to divide the military retirement benefits.

A court may choose to exercise this discretion by conditioning modification on the consent of the moving party to do equity by agreeing to modification of other aspects of the agreement or judgment. (*In re Marriage of Doud, supra,* 181 Cal.App.3d at p. 524; *In re Marriage of Carpenter, supra,* 188 Cal.App.3d at p. 615, fn. 4.) Thus, if there is evidence that an interest in the retirement benefits was traded for other property of the parties, equity may require modification of more than just the retirement benefits.

Further, it has been held to be an abuse of discretion for the trial court to modify the military retirement benefits when there is evidence that the parties had agreed to treat the retirement benefits as community property, unless the court first makes a factual finding on that issue. (*In re Marriage of Downes, supra,* 177 Cal.App.3d at p. 212.)

In the present case Bruno has not met his burden of showing any abuse of discretion on the part of the trial court. " 'An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. [Citing cases.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power.

[Citing cases.]' " (*Miller v. Republic Grocery, Inc.* (1952) 110 Cal.App.2d 187, 190.) Bruno has not demonstrated that the trial court failed to exercise its discretion in applying section 5124, or that equity requires that modification of the division of retirement benefits be conditioned on modification of other aspects of the decree, or that the parties treated the retirement benefits as community property in spite of *McCarty*. On the contrary, the record supports the trial court's decision. Bruno testified that at the time of the dissolution he considered his military retirement to be his separate property. The agreement listed Bruno's military retirement benefits as Bruno's separate property, and awarded those benefits to him. The agreement purported only to make a "fair division of the *community* property of the parties." (Emphasis added.) Thus, we hold that as a matter of law there was no abuse of discretion by the trial court and we affirm the decision to divide Bruno's military retirement benefits between the parties.

VI

TRIAL COURT'S ORDER STATING DATE PAYMENTS WERE TO BEGIN WAS NOT SUPPORTED BY EVIDENCE IN THE RECORD

In her brief on appeal, Sharon noted a technical error in the trial court's order which might result in payment of an incorrect amount to Sharon as her share of Bruno's retirement benefits. Our review of the record reveals another, and potentially more serious error which was not addressed by the parties.

Under the decisions in *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 426, and *In re Marriage of Scott* (1984) 156 Cal.App.3d 251, 253-254, once the employee's

retirement benefits have matured—i.e., once the employee is eligible to retire—the non-employee spouse can elect to receive the present value of the retirement benefits at the time of trial, or can choose to wait until the employee spouse retires. If the retirement benefits have not matured at the time of trial, then the trial court may exercise its discretion in deciding whether to divide the present value of the retirement benefits, or to retain jurisdiction over the retirement benefits in order to divide them at a later time. (*In re Marriage of Brown, supra,* 15 Cal.3d at p. 848.) Since Bruno's pension had not matured at the time of the hearing on the section 5124 motion, Sharon would not have been entitled to her portion in the form of a monthly payment by Bruno. The record suggests, however, that by the time the court reconsiders this matter on remand, Bruno's military retirement benefits will have matured; at that time, Sharon may choose when she wishes to receive her share of the retirement benefits.

Under the *Gillmore* decision, Sharon must choose either the date Bruno is first eligible to retire or the date he actually does retire. "[N]o authority permits her to elect a benefit calculated on a hypothetical retirement at a future date." (*In re Marriage of Castle, supra,* 180 Cal. App.3d at p. 216.) If she chooses to receive payment as of the first date Bruno is eligible to retire, she would be entitled to a proportionate share of cost-of-living increases, but "gives up her right to any future increases in the pension resulting from longevity of service, increased age, or higher salary." (*Ibid.*)

The trial court's order included a calculation of Sharon's proportional interest in the retirement benefits as of October 1, 1986. While those calculations appeared

to be correct for that retirement date, there was nothing in the record to support the choice of October 1, 1986, as the date on which Bruno would be eligible to retire. On remand the trial court should calculate Sharon's proportional interest in Bruno's retirement benefits as of the date the interest is to be divided, if that date is known at the time of the hearing, or should retain jurisdiction over the retirement benefits to divide them at a later time.

On remand the trial court should also resolve the issue raised by Sharon regarding the rate of Bruno's retirement or retainer pay upon its vesting, an issue which should involve no more than the mechanical calculation of the benefits payable to Bruno at the time his retirement benefits mature.

DISPOSITION

We affirm the order of the trial court on all issues except the date on which the payments to Sharon are to begin, Sharon's proportional interest in those payments, and the amount of retirement pay to which Bruno will be entitled at that time. We remand the case to the court below for a factual determination of those issues with directions to enter an order based on the factual findings.

NOT FOR PUBLICATION

THE COURT:

/s/ Hews
J.

/s/ McDaniel
Acting P.J.

/s/ Schulte
J.*

*Assigned by the Chairperson of the Judicial Council.

CALIFORNIA SUPREME COURT
ORDER DENYING PETITION FOR REVIEW

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, No. E003455 S003281

(Filed January 6, 1988)

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF CHALKO

CHALKO, Respondent,

v.

CHALKO, Appellant.

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

4 CIVIL NO. E003455

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of SHARON E. and BRUNO G. CHALKO,	)	
SHARON E. CHALKO, Respondent, v. BRUNO G. CHALKO, Appellant.	)	SBSC No. BFL 1783 (Filed February 22, 1988)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BRUNO G. CHALKO, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal, Second Appellate District, Division Two, affirming the order of the trial court with directions, entered herein on October 20, 1987, and as to which petition for review to the Supreme Court of the State of California was denied on January 6, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Russell Iungerich
Attorney for Appellant
BRUNO G. CHALKO

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A Professional Law Corporation
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Los Angeles, CA 90010
Telephone: (213) 382-8600

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 3580 Wilshire Blvd., Suite 1920, Los Angeles, California 90010. I am employed by a member of the bar of this court.

On February 18, 1988, I served the within

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California:

DENNIS TILTON, Esq.
155 West Hospitality Lane, Suite 210
San Bernardino, CA 92408

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of February, 1988, at Los Angeles, California.

/s/ Katherine Zepeda